Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	WC Docket No. 04-313
Unbundled Access to Network Elements	)	
	)	CC Docket No. 01-338
Review of the Section 251 Unbundling Obligations	)	
Of Incumbent Local Exchange Carriers	)	

COMMENTS OF TELSCAPE COMMUNICATIONS, INC.

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SUMMARY

Telscape has created a successful and profitable CLEC operation serving residential customers utilizing a combination of UNE-L and UNE-P platforms. Telscape serves about 90,000 residential customers, half of them via UNE-L through Telscape's two switches and 36 collocations in the greater southern California region. Further, Telscape has accomplished this by addressing an underserved minority market, where 70 percent of its customers qualify for lifeline services and 90 percent receive their billing in Spanish. Over the last three years, Telscape has become California's third largest provider of lifeline local service, after Pacific Bell and Verizon, and purchases about half the DS0 loops taken by CLECs in California.

In many ways, these facts make Telscape a model for the benefits that local competition can bring. However, Telscape had an advantage in its creation -- it acquired its network infrastructure, 27 collocation facilities, two switches and approximately 23,000 existing customers in a bankruptcy buyout in 2001. Since then, Telscape has grown rapidly using UNE-P to build critical mass in an area served by a central office before building a new collocation facility and migrating its new customers to the UNE-L platform. Thus, Telscape's future success depends upon the continued availability of certain critical market elements. These include: (1) reasonable rates and availability of unbundled local switching; (2) reasonable rates and availability for local loops; (3) reasonable rates and processes for "hot cuts" for migration of UNE-P customers to UNE-L; and (4) reasonable rates and availability for unbundled dedicated DS-1 and shared interoffice transport. Loss of these important competitive elements would harm consumers through fewer telecommunications choices in traditionally underserved markets of low income communities and inner-cities, as well as adjacent areas that are the least likely to receive infrastructure investment by the ILEC's. Responsibility for these competitive building

blocks falls both to the Federal Communications Commission and to state public utility commissions. Telscape urges the Commission to exercise its authority to preserve and enhance these elements wherever possible, and to permit the state public utility commissions to continue their vital role in overseeing certain aspects of local competition.

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Telscape Communications, Inc. ("Telscape"), by its undersigned counsel, respectfully submits the following comments in the above-captioned matter.

I. INTRODUCTION

Telscape Communications, Inc. is a successful example of the pro-competitive policies and goals of the Telecommunications Act of 1996, but it is an anomaly, the result of unique opportunities and a sound, narrowly tailored business plan. Telscape Communications, Inc. started operations on October 30, 2001, the result of a bankruptcy proceeding in which management completed an asset buy out of the California CLEC assets of Telscape International. The purchase included the network infrastructure that was in place, switches and about 27 collocation facilities for approximately 40 cents on the dollar. In addition, Telscape began operations with about 23,000 of the existing customers of the bankrupt entity, as well as an established workforce. Since then, Telscape has become a highly successful, local provider serving mostly residential subscribers and a few single line businesses in California and Nevada using both UNE-L and UNE-P platforms. Telscape is minority-owned, minority managed, and serves largely minority customers with a fully bilingual switch network.

Telscape acknowledges that its fortuitous beginning, in conjunction with its narrowly focused business plan, has afforded it a unique opportunity and led to its success as a UNE-L provider. However, the Company also recognizes and appreciates the role UNE-P has played in its success, as well as the continued necessity of UNE-P for Telscape's future success. Telscape's business success demonstrates that, with the essential access to UNE-P, CLECs can systematically build the necessary critical mass of customers that will enable them to compete for residential customers using a competitive switch-based business model. Telscape acknowledges its unique head-start in acquiring its switches and network infrastructure at a substantial discount, along with 23,000 active customers from Day One. These opportunities enabled Telscape to take advantage of UNE-P and transition customers to UNE-L successfully, without the typical start-up costs or lack of early revenue faced by most fledgling CLECs. However, Telscape's growth and expansion in the three years since its inception demonstrated that facilities based residential competition can work if both UNE-P and UNE-L are available and reasonably priced. For example:

- Telscape has expanded from 23,000 to 90,000 customers and continues to grow rapidly;
- Of those 90,000 customers, over 99% are residential, single line users;
- About 90% of Telscape's customers receive their invoice in Spanish and 70% qualify for lifeline services, making Telscape the third largest provider of such services in California (behind only Pacific Bell and Verizon);
- Telscape provides these services profitably using a combination of UNE-L and UNE-P, utilizing two Nortel DMS 500 switches;
- About 50% of Telscapes' 90,000 users are currently served by UNE-L from

one of 36 central offices where the company maintains collocations (the company subscribes to approximately half the competitive DS0 residential loops leased in California); these collocation spaces are interconnected with one of the Telscape switches via dedicated DS-1 UNE transport;

Telscape has succeeded by maintaining a geographically regional focus, thereby building sufficient subscriber concentration to justify its own switches and local network, in conjunction with ILEC supplied loops and central office collocations for the core of its business plan. Nonetheless, UNE-P is vital to Telscape's continued growth and success. By vastly reducing the costs of initial market entry into an area served by a single central office, UNE-P enables Telscape to spend its efforts and investment on building a customer base served by that central office before it deploys its collocation and transport facilities at that CO. When the customer numbers reach a critical mass, Telscape invests in collocation and transport facilities and converts its customers from UNE-P to UNE-L. To date, Telscape is collocated in about three dozen COs in southern California, up from the original 27 collocations it acquired in 2001.

By enabling Telscape to build and expand its service area CO-by-CO, UNE-P provides a critical contribution to lowering the barriers to entry into local telecommunications. The Commission should not permit this critical element to successful competitive entry to disappear by giving in to the ILEC's unrelenting legal challenges to the continuation of local switching as an unbundled network element. If UNE-P is eliminated, consumers would be harmed by less telecommunications choices in the traditionally underserved markets of the low income communities and inner-cities, and their adjacent areas which are least likely to receive infrastructure investment by the ILEC's.

II. THE KEYS TO SUCCESS IN LOCAL TELECOMMUNICATIONS COMPETITION

Telscape's continued success in serving residential customers using its UNE-L/UNE-P strategy depends upon the continued availability of certain critical market elements. These include: (1) reasonable rates and availability of unbundled local switching; (2) reasonable rates and availability for local loops; (3) reasonable rates and processes for "hot cuts" for migration of UNE-P customers to UNE-L; and (4) reasonable rates and availability for unbundled dedicated DS-1 and shared interoffice transport. Responsibility for these competitive building blocks falls both to the FCC and to the state public utility commissions. The FCC should exercise its authority to preserve and enhance these elements wherever possible, and it should permit the State PUCs to continue their vital role in overseeing certain aspects of local competition.

A. The Commission Should Preserve Unbundled Local Switching as a UNE

Telscape depends upon UNE-P to expand its geographic territory on a CO-by-CO basis. For an early stage, growing company, the ability to enter an area and build a critical mass of customers before making the substantial investment in switching collocation and transport facilities is critical to its ability to compete. Telscape expects to depend upon the availability of UNE-P to support this business model as it grows, especially as it adds other metropolitan areas such as Miami, Houston and Dallas, to its coverage area. For these reasons, Telscape endorses the Comments filed today by the PACE Coalition et.al. in support of the preservation of ULS as an unbundled network element and UNE-P as an entry strategy.

In order for the Commission to fully and fairly evaluate the issues at hand, it must recognize the impairments that frustrate entry in each market, and establish unbundling and transition policies that remove those barriers. If the Commission eliminates local switching as a section 251(c)(3) UNE without properly considering whether the underlying impairment has

been removed -- and without adopting a transition mechanism to permit carriers and customers to adjust -- the fundamental goals of the Act will be jeopardized. Consumers will be harmed because geographic competitive growth will be greatly reduced and the traditionally underserved markets of the low-income and inner-city will continue to be underserved.

Unbundled local switching enables an entrant to build the density needed to justify facilities deployment. A fundamental impairment confronting entrants attempting to offer mass market POTS services using self-provisioned local switching is the cost of collocation facilities needed to concentrate analog loops in a CO and backhaul those loops to a CLEC-switch location. Critically, these additional costs are sensitive to the number of revenue-producing loops an entrant will have in a particular CO. As a result, alternative facilities cannot generally be deployed to serve customers in a CO until a threshold density is achieved by the CLEC. Although collocation and backhaul costs generally create a barrier to entry into the POTS market that qualifies as impairment, there are specific circumstances where carriers are able to achieve line concentrations that justify facilities deployment. This has been the experience of Telscape.

Unbundled local switching enables carriers to gain a sufficient foothold in a market to justify the collocation of facilities. It also creates opportunities for consumers in adjacent areas of infrastructure investment to enjoy the same benefits of competitive offerings as other consumers. Creating such a base of customer lines, even for a carrier with a business plan to rapidly build density, takes time; and, the availability of unbundled local switching gives a carrier that time, enabling it to build that base and expand its network rationally.

The advantage of this approach is that it clearly tracks a key impairment that would otherwise discourage facilities deployment, *i.e.*, customer density. While the incumbent effectively inherits its density from its decades of monopoly (and the government protection that

enforced that monopoly, such as a guaranteed rate of return), the CLEC must have time to build its density, and must do so in an environment of virtually unconstrained competitive response (*i.e.*, winback) by the ILEC. It should also be noted that CLEC's do not operate with a guaranteed rate of return: the CLEC investment risk factor is 100%.

In addition, by permitting carriers to lease unbundled local switching to serve customers in COs where the threshold density has not been achieved, carriers will be able to more effectively meet customer needs and operate their business in a more efficient manner. For example, advertising typically cannot be limited to the boundaries of the area served by a telephone central office. UNE-P allows a CLEC to serve customers outside the COs where it currently has collocations, or where it is currently building the density to justify a transition to UNE-L. The result of this is to further the interests of facilities-based competition. Also, by permitting ULS, the entire wireline industry will help in maintaining the wireline infrastructure.

B. The Commission Should Ensure Reasonable Loop Availability

Telscape's current business model utilizes primarily DS0 loops, which are not directly at issue in this proceeding. The Commission's national finding of impairment for DS0 loops was not vacated by *USTA II*. That does not mean, however, that the outcome of this proceeding will have no impact on the price and availability of DS0 loops in the future. In particular, the availability of enhanced extended links ("EELs") and DS3 transport directly impact the cost and availability of strategies utilizing DS0 . As such, Telscape supports the statements made by the Loop and Transport CLEC Coalition ("L&T Coalition"), in its Comments filed today, with regard to the importance of DS-1 loops and transport (EELs) and DS-3 transport. As the L&T Coalition noted, all five Commissioners in the *TRO* agreed that competitive LECs are impaired nationwide without DS1 UNE loops, stating that " revenues generated from small and medium enterprise customers are not sufficient to make self-deploying DS1 loops economically feasible

from a cost-recovery perspective," [1] and further that "[c]ompetitive carriers do not have the ability to recover sunk costs in self deploying DS1 loops."[2] Based on the overwhelming and largely unrebutted evidence of DS1 loop impairment, these findings were not difficult for the Commission to make. Indeed, as the Commission observed, the incumbent LECs themselves admitted that impairment exists for DS1 loops and such facilities merited more lenient treatment than other UNEs at issue.[3] Moreover, deployment of transport is not economical unless the carrier has a need for multiple DS3s on the particular route.

The costs of self-deploying transport facilities include collocation costs, the cost of fiber, the cost of physically deploying the fiber, the cost of optronics necessary to light the fiber, and the cost of obtaining right-of-way for the fiber deployment.[4] The optronics that must be placed in a collocation arrangement to provide interoffice transport include optical path panels (to terminate and cross connect the fiber facility), optical multiplexers, and power distribution (*e.g.*, power filtering and fuses) equipment. Furthermore, transport costs are sunk costs since the facility cannot be moved to another location should a carrier decide to exit a market. In addition, constructing interoffice transport fiber facilities is very time-consuming, creating a delay that provides ILECs with significant "first mover" advantages.

Given the extraordinary cost of constructing interoffice transport facilities, it simply is not economic to build unless a CLEC has accumulated a very large volume of traffic on a particular route. Telscape supports the L&T Coalition's urging of the Commission to find impairment for all routes where at least one end point serves a central office with fewer than

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1 *Trainer Review Order at ¶ 326*

2 *Id.*

3 *Id. at* ¶ 325 & fn. 960 *(citing to* SBC Comments and SBC Reply Comments).

4 *TRO*, ¶ 371.

25,000 business lines. As the Coalition states, for these routes, requesting carriers are not likely to be able to overcome the barriers to deploying DS3 transport or dark fiber. Continued access, at reasonable rates and terms, to EELs and transport is essential to the competitive market.

Moreover, Telscape expects to broaden its service offerings in the future and anticipates the need for other, higher capacity facilities. The single greatest factor in facilities competition is access to the UNE-Loop. Without access to the UNE-Loop, basic and advance communications such as VoIP and broadband rollout will be stifled as the ILECs historically do not rollout new products and services until pushed by the competitive market, *i.e.* DSL and VoIP. In order to ensure the continued development of a competitive market, the Commission must continue to ensure reasonable loop availability.

C. The Commission Should Act to Defend Reasonable Hot Cut Pricing and Processes

Telscape contends that the Commission must act to defend reasonable "hot cut" pricing and processes by requiring all ILECs to have efficient and workable hot cut procedures in place before they can be permitted to cease providing unbundled local circuit switching. This is essential, as carriers will simply be unable to serve the mass market via competitively provided switching unless ILECs have efficient hot cut procedures in place. Even now ILECs do not have workable procedures in place to efficiently process hot cut requests, which are significantly fewer than the number of requests they will need to process if the Commission eliminates unbundled local switching as a network element under section 251(c)(3). The continuing failure of ILECs to perform hot cuts efficiently, as well as the high cost of hot cuts, continues to pose substantial barriers to entry for competitive carriers.[5]

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[5] *Triennial Review Order*, ¶ 469 (stating, "We find the issue is not how well the process works currently with limited hot cut volumes, rather the issue identified by the record...is an inherent limitation in the number of manual cutovers that can be performed, which

As the Commission stated in the *Triennial Review Order*, switch-based CLECs must gain access to the customer's loop facilities, which are provided primarily by the ILEC, in order to connect their switch to the ILEC's loop.[6] To be able to serve the customer using a competitive switch, the CLEC must physically transfer the customer's line from the ILEC switch to the CLEC switch, a process referred to as a hot cut or coordinated cutover. Absent the hot cut, the CLEC cannot serve that end user mass market customer. There are several types of hot cuts, and the Commission must ensure that the ILEC maintains adequate procedures for each. First, competitive carriers should be able to request a hot cut of a single or several lines. Second, ILECs should have procedures in place for bulk hot cuts, where a single CLEC is requesting the conversion of a large number of lines. Third, ILECs also must have procedures for batch hot cuts, whereby the ILEC aggregates hot cut requests from multiple carriers and executes those requests at the same time. The Commission must require ILECs to establish and maintain processes and procedures, at reasonable rates, for each category of hot cuts. The Commission must prohibit ILECs from unilaterally declining to provide any of these types of hot cuts.

Although the procedures for these hot cuts vary to some degree, there are commonalities that the Commission must require are present in each hot cut process. Specifically, the Commission must require ILECs to have a throwback procedure in the event that the hot cut is unsuccessful. A throwback is the process used to move an unbundled loop that the ILEC recently cut over to a CLEC's switch and is experiencing a problem, back to its original state to restore the customer's service. This process effectively reestablishes the customer as a UNE-P customer, with dial tone from the ILEC switch. A throwback process is essential to preventing -

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poses a barrier to entry into a market uneconomic.") (citations omitted), ¶ 470 (stating that "[t]he cost of hot cuts, exacerbated by churn, creates a cost disparity that makes it uneconomic to serve mass market customers.") (citations omitted).

6 *Triennial Review Order* ¶464.

or at least mitigating - service disruption to the end user customer. In addition, the Commission must require ILECs to provide bulk and batch hot cut processes for all loops, regardless of whether the loop is copper or on a non-copper facility such as an Integrated Digital Loop Carrier ("IDLC") system.

Accordingly, the Commission must ensure that all ILECs have efficient hot cut procedures in place, and at reasonable rates - for single hot cuts, bulk hot cuts, and batch hot cuts - that can accommodate the volume of requests ILECs will receive, before they are permitted to cease providing local switching as a section 251(c)(3) UNE.

D. Special Access Services Are Not A Solution For The Impairment Experienced By CLECs Using High Capacity Facilities.

The ILECs' exorbitant special access pricing in their tariffs makes clear that the ILECs do not face effective competition in the market for high-capacity loop and transport facilities. Providing access to ILEC facilities simply is not helpful if they are priced so high as to provide ILECs an inherent advantage in pricing end user services. That is precisely why ILEC special access services cannot sustain entry by wireline competitors. Where CLECs utilize tariffed special access services, they do so overwhelmingly only where no real alternatives exist to permit them to enter into or expand within a local market. The fact that CLECs are "forced" in some cases to rely on special access in the short term, until unbundled network elements can be obtained, is not a basis for a finding of no impairment. The availability of Section 251(c)(3) unbundled loops and transport functions serve as a check on further abuses by ILECs with respect to special access pricing (and provisioning). The situation will deteriorate rapidly absent unbundled access to ILEC network facilities, where special access will be the only functional alternative – *and an entirely uneconomic one.* Therefore, and as shown herein, absent the development of significant competition to constrain the ILECs' market power in the relevant

markets for special access, or a radical restructuring of special access price regulation to simulate pricing in a robustly competitive market, the mere availability of special access facilities should be accorded no weight in any impairment analysis. Indeed, under the *USTA II* decision, the Commission is justified in creating a blanket rule treating the availability of ILEC tariffed service as irrelevant to impairment because of the risk of ILEC abuse and resulting pricing discrimination in the relevant market for special access and the administrative difficulties in relying on special access pricing as the trigger for impairment.

Replacing existing UNE transport services for CLECs would have similarly severe adverse consequences, increasing CLEC costs significantly. Should the Commission mandate the use of tariffed special access as the only option for competitive carriers to provide service to their customers, this further would serve to usurp the ability of competitive carriers to price their services in competition with ILEC service offerings.

E. The Commission Should Not Exclude State PUC Involvement in Local Competition Matters

Telscape encourages the Commission to not disregard or exclude state public utility commissions from matters that involve local competition. As mentioned, Telscape's largest existing business operation is located in California. As such, Telscape has a direct relationship with the CPUC and recognizes the unique value and expertise that state public utility commissions bring to the table with regard to local telecommunications issues. State commissions have continuously demonstrated their expertise, and garnered much experience, in the years since the 1996 Act was implemented. Through a more narrow focus on the issues, a granular knowledge of local markets, establishing processes for rate setting and review, as well as overseeing carrier arbitrations and other disputes between carriers, state commissions have demonstrated their expertise and unique value to the process of overseeing issues particular to

intrastate competition.

Indeed, the Commission has specifically supported the authority of state commissions, in particular with regard to the enforcement of carrier interconnection agreements.[7] This same state commission authority has also been upheld by federal and state jurisprudence, including the United States Supreme Court in *Verizon Md., Inc. v. PSC*[8] as well as numerous circuit court decisions.[9] Specifically, the Eleventh Circuit held that

> a common sense reading of [section 252] leads to the conclusion that the authority to approve or reject agreements carries with it the authority to interpret agreements that have already been approved. We

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7 *Joint Application by SBC Communications Inc., Illinois Bell Telephone Company, Indiana Bell Telephone Company Incorporated, the Ohio Bell Telephone Company, Wisconsin Bell, Inc., and Southwestern Bell Communications Services, Inc. for Authorization To Provide In-Region, InterLATA Services in Illinois, Indiana, Ohio, and Wisconsin*, FCC 03-243, Memorandum Opinion and Order, 18 FCC Rcd. 21,543 (October 15, 2003) (citing *see* e.g., *BellSouth Telecomms., Inc. v. MCIMetro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1276-77 (11th Cir. 2003) ("[I]n granting to the public service commissions the power to approve or reject interconnection agreements, Congress intended to include the power to interpret and enforce in the first instance."); *S.W. Bell Tel Co. v. Brooks Fiber Communications of Okla., Inc.*, 235 F.3d 493, 497 (10th Cir. 2000) (finding that state commission's authority "to approve or reject and mediate or arbitrate interconnection agreements necessarily implies the authority to interpret and enforce specific provisions contained in those agreements"); *S.W. Bell Tel. Co., v. Connect Communications Corp.*, 225 R.3d 942, 946 (8th Cir. 2000) (finding that section 252's "grant of power to state commissions necessarily includes the power to enforce the interconnection agreement"); *MCI Telecomms. v. Ill. Bell Tel. Co.*, 222 F.3d 323, 337-38 (7th Cir. 2000) ("A state commission's authority to approve or reject interconnection agreements under the Act necessarily includes the authority to interpret and enforce, to the same extent, the terms of those agreements once they have been approved by that commission."); *S.W. Bell Tel. Co. v. Pub. Util. Com'n of Tex.*, 208 F.3d 475, 479-80 (5th Cir. 2000) ("[T]he Act's grant to the state commissions of plenary authority to approve or disapprove these interconnection agreements necessarily carries with it the authority to approve or disapprove these interconnection agreements necessarily carries with it the authority to interpret and enforce the provisions of agreements that state commissions have approved.").

8 535 U.S. 635, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002).

9 *See e.g. Bell Atl. Md., Inc. v. MCI WorldCom*, 240 F.3d 279, 304 (4th Cir.2001) (the court flatly stated that state commissions have authority to interpret and enforce interconnection agreements); *Southwestern Bell Tel. Co. v. PUC*, 208 F.3d 475, 479-80 (5th Cir.2000); *Southwestern Bell Tel. Co. v. Brooks Fiber Communs. of Okla., Inc.*, 235 F.3d 493, 497 (10th Cir.2000); *Puerto Rico Tel. Co. v. Telecommunications Regulatory Bd.*, 189 F.3d 1, 10-13 (1st Cir.1999); *Illinois Bell Tel. Co. v. WorldCom Techs., Inc.*, 179 F.3d 566, 573 (7th Cir.1999); *Iowa Util. Bd. v. F.C.C.*, 120 F.3d 753, 804 (8th Cir. 1997).

> find further support for this conclusion in the recent decision of the Supreme Court in *Verizon Md., Inc. v. PSC*, 535 U.S. 635, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002), in the decisions of all other circuit courts to have considered the question, and in the determination of the Federal Communications Commission, ("FCC"), which is entitled to deference in the interpretation of the pertinent statute.[10]

Continuing to respect and encourage the participation of state commissions in those issues directly impacting local competition is essential to maintaining the established framework of concurrent jurisdiction between the Commission and the states. The Commission should not act to exclude, or otherwise hinder, state commissions from active participation and oversight of local competition.

The Commission has also sought comment on whether, under section 252 of the Act, ILECs are required to file agreements "governing access to network elements for which there is no section 251(c)(3) unbundling obligations."[11] Telscape believes that the Commission must require carriers to file all commercially negotiated agreements with the applicable state commissions. There is no question that commercially negotiated agreements that contain rates, terms and conditions for items that are required of the Act, are subject to filing with the appropriate state commission under sections 251 and 252 of the Act. In addition to fulfilling the explicit statutory obligation in the Act, it is necessary for the Commission to require carriers to file these agreements in furtherance of the nondiscrimination obligations set forth in the Act. Absent compliance with this fundamental requirement, there is no way to assess the terms and conditions upon which the ILEC has agreed to provide network elements to carriers, and no way to determine whether the ILEC is making available its commercial agreements to all carriers equally. Acting in accordance with the nondiscrimination obligations would further the

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10 *Bellsouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc.*, 317 F.3d 1270, 1274 (2003).

11 *NPRM* ¶ 13.

Commission's goals of restoring certainty in the marketplace and promoting competition.

III. CONCLUSION

Telscape is living proof that local competition can succeed, for residential services using facilities-based competition -- IF the proper rules and market conditions are in place. An essential part of this is the continued availability of unbundled local switching as a UNE to enable CLECs to build critical mass in a central office area before investing in expensive collocation, switching and transport facilities. The FCC has the opportunity, indeed the obligation, to ensure in this proceeding that those pro-competitive rules and conditions are preserved and not extinguished by the relentless litigation and lobbying tactics of the major ILECs. Anything less will fail to measure up to the expectations and intent of the Congress as expressed in the Telecommunications Act of 1996.

Respectfully submitted,

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